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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 428

AMERICAN SURETY CO. OF NEW YORK, *Petitioner*,

v.

RAMONITA BARRIENTOS, ET AL., *Respondents*.

BRIEF FOR RESPONDENT GOVERNMENT OF THE CAPITAL IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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QUESTION PRESENTED

Whether it is a deprivation of property without due process of law for a State Court to hold that a surety which undertakes to finish the work upon default of its principal contractor is liable for the cost of restoring the adjoining properties to their original condition, as provided in the contract, even if that cost exceeds the limit specified in the bond.

ARGUMENT

I. The federal question was not timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

The judgment against petitioner herein for the full amount of damages was first rendered by the Superior Court of Puerto Rico, San Juan Part, on February 12, 1962 (Pet. App. 29a-32a). Petitioner *did not* file then a motion for rehearing raising the constitutional questions that it now presents before this Court. On March 14, 1962 petitioner filed a petition for review before the Supreme Court of Puerto Rico and again it *failed to raise* any question of due process of law. (R. 102-114). After the Supreme Court affirmed the judgment below, petitioner filed a motion for reconsideration on October 15, 1969 and *no* federal question was raised there either. (R. 152-156). As a matter of fact, petitioner admits (Petition, 7) that the first mention of "due process" was made in its Reply to the Motion for Reconsideration of the Government of the Capital and petitioner then disclaimed any intention to "criticize the opinion of this court" (R 164). It was not until May 4, 1970 in a motion to have the mandate returned and withheld that petitioner stated: "In the petition for certiorari before the Supreme Court of the United States appellant shall contend that the judgment rendered in this case is unconstitutional because it deprives appellant of its property without due process of law. . . ." (R. 173-74). Said motion did not request that the Supreme Court of Puerto Rico pass on the federal questions mentioned therein and at no prior time was the Court given an opportunity to consider the constitutional questions now raised before this Court.

We submit that the federal questions were not timely or properly raised in the court below and should not be considered by this Court. *Street* v. *New York*, 394 U.S. 576, 582 (1969), and cases cited.

II. The judgment of the Supreme Court of Puerto Rico is correct and proper.

The Supreme Court of Puerto Rico correctly held that once the petitioner American Surety Co. undertook to finish the work, it stood in the shoes of its principal Island Constructors and had to fulfill all the obligations of the latter without regard to the amount fixed in the bond. Other courts in the United States have similarly ruled. See: e.g. *McWaters and Bartlett* v. *United States*, 272 F.2d 291, 295 (CA 10, 1959), where it was held in a case involving this same petitioner that:

> "Without detailing the evidence, we content ourselves by saying there is evidence to sustain the court's finding of fact that American Surety Company took over Clark's contract and agreed to complete it. That would, of course, subject itself to full liability for all amounts incurred in furnishing labor and material in the completion of the job, irrespective of the $69,000 liability limitation in its bond. The court, accordingly correctly concluded, as a matter of law, that by such action American Surety Company waived the penalty limitation of its bond."

The obligations assumed by American Surety included the restoration of private property to its original condition or making good the damage therein. (R 183-184). The subcontract whose completion was undertaken by American Surety provided that the subcontractor would complete the work "in accordance with the conditions and applicable provisions of the

above named contract between the Owner and the Contractor" (R 188) and it agreed to assume "all the obligations and responsibilities which the Contractor has assumed toward the Owner" (R 189).

Once the Supreme Court decided that the Government of the Capital was directly liable to plaintiffs (owners of the adjacent property) it was bound to grant the cross-complaint of the Government against American Surety[1] for indemnity. To do otherwise would have released American Surety from the liability that it assumed when it exercisyd the option to perform the contract. The Supreme Court of Puerto Rico did not err in recognizing a cause of action to the Government for indemnity under the bond; certainly such recognition can not be considered a deprivation of due process of law.

The mistake of petitioner lies in insisting that it was held liable for the negligence of the subcontractor. Actually its liability stems from the specific provisions of the contract which it undertook to perform itself when its principal failed.

III. The judgment of the Supreme Court of Puerto Rico, even if erroneous, does not amount to a violation of due process.

In *Slochower* v. *Board of Ed. of N. Y.*, 350 U.S. 551; 562 (1956), it was said: "For this Court to hold that state action in the field of its unchallenged powers violates the due process of the Federal Constitution requires far more than mere disagreement with the legal conclusions of state courts."

The holding of the court below that the liability of American Surety under the circumstances of this case

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[1] Contrary to Petitioner's allegation (Petition, footnote 3), respondent herein *did* file a cross claim against subcontractor "and its insurer" American Surety dated June 20, 1958 (R 37-39).

extended beyond the limits of the bond, is a matter of local law, and so is the recognition of a right to indemnity in favor of respondent herein. This Court has acknowledged the supreme power of state courts to interpret and declare the written and unwritten laws of the state. *Brinkerhoff-Faris Trust & Saving Co.* v. *Hill,* 281 U.S. 673, 680 (1930), where it was said that "the mere fact that a state court has rendered an erroneous decision on a question of state law does not give rise to a claim under the 14th amendment or otherwise confer appellate jurisdiction on this court".

This case involves the interpretation of a surety contract under Puerto Rican law and it is well settled that construction of a local contract under local law does not give rise to a federal question. *Black* v. *Cutler Laboratories,* 351 U.S. 292 (1955). A long line of decisions hold "that the provisions of Sec. 10 Art. 1 of the Constitution protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgment of courts". *Tidal Oil Co.* v. *Flanagan,* 203 U.S. 444, 451 (1924).

Finally, this Court has specifically ruled that great deference must be paid to decisions of the Supreme Court of Puerto Rico in matters of local law. *De Castro* v. *Board of Commissioners,* 322 U.S. 451 (1944).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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